

**\*E-FILED 1/22/08\***

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

CANTER & ASSOCIATES, LLC, et al.,

NO. C 07-3225 RS

Plaintiffs,

**ORDER RE DISCOVERY  
DISPUTES**

v.

TEACHSCAPE, INC.,

Defendant.

I. INTRODUCTION

Plaintiff Laureate Education, Inc. and its subsidiary, plaintiff Canter & Associates, LLC (collectively "Canter") moved to compel defendant Teachscape, Inc to make its initial disclosures under Rule 26 of the Federal Rules of Civil Procedure. Teachscape served those disclosures the same day it filed its opposition to the motion; the only question remaining, therefore, is whether Teachscape was substantially justified in refusing to make those disclosures at an earlier time. For the reasons set forth below, the Court concludes that Teachscape was mistaken in its view of when initial disclosures were due, but that it did not act in a manner that would support imposing

1 sanctions.<sup>1</sup> Canter's further motion seeking entry of a protective order to govern the production of  
 2 confidential information in this action will be denied without prejudice, and the parties will be  
 3 directed to renew their efforts to reach an agreement as to the form of such an order.

## 4 II. DISCUSSION

### 5 A. Initial Disclosures

6 There appears to be no dispute that Teachscape was reluctant to provide initial disclosures in  
 7 this action (or to engage in other discovery) based in part on its belief that there is no basis for  
 8 federal jurisdiction over this controversy. Teachscape initially proposed that it would *object* to  
 9 providing initial disclosures on grounds that they would not be "appropriate in this action." Rule 26  
 10 (a) (1) (C) expressly permits a party to make such an objection "in the proposed discovery plan,"  
 11 and, when such objection is made, the rule provides that *the Court* "must determine what  
 12 disclosures, if any, are to be made and must set the time for the disclosures." Thus, Teachscape  
 13 would have been within its rights to refuse to make any initial disclosures until obtaining a court  
 14 ruling on the validity of its objections that proceeding with initial disclosures would be inappropriate  
 15 under the particular circumstances of this action.<sup>2</sup>

16 Teachscape ultimately chose not to seek a court ruling on its objection that initial disclosures  
 17

---

18  
 19  
 20  
 21 <sup>1</sup> Canter has not moved for sanctions. As Canter appears to recognize, under Civil Local  
 22 Rule 7-8, it would have to do so via separately-noticed motion. Canter's reply brief, however,  
 23 expressly requests a determination at this juncture as to whether Teachscape's conduct was  
 24 substantially justified. While that determination ordinarily would be made only in the context of a  
 sanctions motion, the parties will not be put to the expense and burden of briefing such a motion,  
 given the Court's view that sanctions are not warranted.

25 <sup>2</sup> This does not mean, however, that a party may avoid its initial disclosure obligations by  
 26 interposing a *frivolous* objection. While such an objection might technically excuse the initial  
 27 disclosure obligation until a court ruling issues, the assertion of a frivolous objection will have  
 28 consequences. In this instance, it is unlikely that the Court would have accepted an argument that  
 initial disclosures could be delayed until federal jurisdiction is established. The pendency of a  
 motion to dismiss almost never serves to excuse compliance with initial disclosure obligations. The  
 objection, however, would not appear to have been frivolous. In any event, the Court need not  
 decide the issue because Teachscape elected not to stand on the objection.

1 should be stayed pending resolution of the jurisdictional issue.<sup>3</sup> Instead, Teachscope took the  
2 position that its initial disclosures were not due until whatever day the parties' joint Case  
3 Management Conference ("CMC") Statement ultimately became due. Thus, even though  
4 Teachscope at one point promised to serve its initial disclosures on October 31, 2007, (the day the  
5 joint CMC statement was then due), it revoked that offer when the Court *sua sponte* continued the  
6 CMC.

7         Canter vigorously complains that nothing in the Federal Rules, the Local Rules, or standing  
8 orders, supports Teachscope's contention that it was permitted to delay its initial disclosures until the  
9 date that the joint CMC statement ultimately became due. Canter is correct that the Court's initial  
10 form scheduling order set September 26, 2007 as a date certain for serving initial disclosures. Canter  
11 is also correct that none of the subsequent Clerk's notices continuing the date of the CMC  
12 conference made any express mention regarding the time for serving initial disclosures. Finally,  
13 Canter may be correct that Teachscope could or should have sought clarification from the Court, if  
14 the parties were unable to agree as to the effect of the continuation of the CMC on their disclosure  
15 obligations.<sup>4</sup>

16         Nonetheless, Teachscope was not wholly without justification for believing that the deadline  
17 for serving initial disclosures should be deemed to move automatically with the deadline for filing a  
18 joint CMC statement. Among other things, the Court's initial scheduling order draws a clear  
19 association between the deadline for serving initial disclosures and the filing of a joint CMC  
20 statement and there was at least some logic to Teachscope's position that the events should go hand  
21 in hand. If, for instance, Teachscope had chosen to stand on its objection to initial disclosures going  
22 forward at all, that would have been presented to the court as part of the CMC statement.

---

24         <sup>3</sup> Teachscope portrays this choice as having been made as an attempt to compromise and to  
25 avoid unnecessary law and motion practice. Nothing in this order should be construed as *either*  
26 accepting *or* rejecting that characterization.

27         <sup>4</sup> In the ordinary course, the Court would expect parties to be able to resolve issues like this  
28 between themselves. Although *any* delay may be significant under particular circumstances, it is  
difficult to understand why parties would be unable to reach some compromise as to when initial  
disclosures will be served when the Court, for whatever reasons, has chosen to continue a CMC for  
some short period of time.

1 Under these circumstances, while the more appropriate course of action for Teachscape to  
2 take would have been either to adhere to the original deadline or to seek relief from the Court, the  
3 position it took does not serve as a basis for imposing sanctions. Because there is no dispute that  
4 Teachscape has now provided its initial disclosures, there is nothing to compel and Canter's motion  
5 is denied on that basis.

6  
7 B. Protective order

8 Canter seeks entry of a generalized protective order that would govern the production of  
9 confidential information in this action. Teachscape's opposition to the motion effectively concedes  
10 that it has been unwilling to negotiate the terms of any such protective order, based on its argument  
11 that discovery in this action should not proceed until the Court has definitively concluded there is a  
12 basis for federal jurisdiction. To the extent Teachscape in good faith believed that negotiating for a  
13 protective order might undermine its arguments that there is no basis for federal jurisdiction over  
14 this dispute, Teachscape is hereby advised that it may and must engage in good faith meet and  
15 confer negotiations over the terms of a protective order, and that doing so will in no way prejudice it  
16 with respect to the jurisdictional arguments it has made. Accordingly, Canter's motion for a  
17 protective order is denied, without prejudice. The parties are hereby ordered to meet and confer to  
18 attempt to reach a stipulated form of protective order, to be submitted to the Court within 15 days of  
19 the date of this order. In the event the parties are unable to reach an agreement, they may  
20 simultaneously submit their respective proposals, under the cover of letter briefs, not to exceed three  
21 pages each, outlining their disagreements and the basis of their respective positions.

III. CONCLUSION

For the reasons explained above, the motion to compel is denied, and the motion for a protective order is denied, without prejudice.

IT IS SO ORDERED.

Dated: January 22, 2008



RICHARD SEEBORG  
United States Magistrate Judge

**THIS IS TO CERTIFY THAT NOTICE OF THIS ORDER HAS BEEN GIVEN TO:**

Gayle M. Athanacio gathanacio@sonnenschein.com, clepera@sonnenschein.com,  
hkalay@sonnenschein.com, pcranmer@sonnenschein.com

Elena Maria DiMuzio Elena.DiMuzio@hellerehrman.com

Annette L. Hurst annette.hurst@hellerehrman.com, brett.stone@hellerehrman.com,  
dluster@hellerehrman.com, patti.johnsen@hellerehrman.com, schilds@hellerehrman.com

Daniel N. Kassabian daniel.kassabian@hellerehrman.com, allen.rose@hellerehrman.com,  
harriette.louie@hellerehrman.com

Counsel are responsible for distributing copies of this document to co-counsel who have not  
registered for e-filing under the Court's CM/ECF program.

**Dated: 1/22/08**

**Richard W. Wieking, Clerk**

**By: Chambers**

ORDER RE DISCOVERY DISPUTES  
C 07-3225 RS